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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Alan DeOcampo,

Petitioner,

v.

The Superior Court of Alameda County,

Respondent.

The People of the State of California,

Real Party in Interest

Petition For Writ of Certiorari To The California Court of Appeal, First Appellate District, Division One

Syda Kosofsky
California Bar #172184
849-C Almar Ave. #194
Santa Cruz, CA 95060
(831) 425-7702
Counsel for Petitioner

Filed November 9, 2009

QUESTIONS PRESENTED

1. Is The Fourth Amendment's Requirement Of Probable Cause Violated By Seizure of A Law Office's Client Files Without Evidence That The Law Office Was Involved In Widespread Insurance Fraud?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALAN DEOCAMPO, Petitioner

v.

The SUPERIOR COURT of Alameda County, Respondent; The PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE

Petitioner, Alan DeOcampo, respectfully asks that a writ of certiorari issue to review the order denying the petition for writ of mandate by the California Court of Appeal, First Appellate District, Division One, filed on July 8, 2009.

This petition is filed to ask the Court to seek enforcement of the Fourth Amendment's requirement that a warrant be issued only upon

probable cause and with particularity. This case presents important issues of federal law concerning search and seizure of attorney client files. Specifically, review is necessary because this case could set dangerous precedent that will lead to the disclosure of a law office's client files despite the absence of probable cause to believe that any of those clients were involved in insurance fraud or other wrongdoing. The issues underlying this case are important and likely to reoccur on a frequent basis.

OPINION BELOW

The order of the California Court of Appeal filed on July 8, 2009 without an opinion, denying both the petition for writ of mandate and the request for a stay, is attached as Appendix B. The California Supreme Court's one-page order denying review is attached as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The order of the California Court of Appeal for which petitioner seeks review was issued on July 8, 2009. The California Supreme Court order denying petitioner's timely petition for discretionary review was filed on August 12, 2009. This petition is filed within 90 days of the California Supreme Court's denial of discretionary review, under Rules 13.1, 29.2 and 30.1 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment 14:

> No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

A. Investigation

From August 2004 to March 2006, Investigator Chris Linehan of the California Highway Patrol conducted an investigation into "capping" activities involving fraudulent insurance claims. Using undercover officers, the investigation resulted in the filing of five separate false insurance claims. In each instance, Norberto Diaz Mora, Jr., referred to as "Chito," was involved. Only two of the claims had any connection to the Law Offices of Alan DeOcampo, and the investigators never had any contact with petitioner himself.

In August 2004, Mora assisted Investigators Linehan (using the name Chris Sanchez) and Lasola (using the name Albert Gonzales) in filing a claim with USAA through Petitioner's Law Office. During this process, Mora: 1. initiated contact with the investigators, 2. referred the investigators to Dr. Wu, a chiropractor, who provided treatment despite knowing they were not injured and recommended they cause further damage to their vehicle, 3. called the investigators to let them know their claim had settled. Ultimately, an insurance check was made out to the Law Offices of Alan DeOcampo and to Albert Gonzales and Chris Sanchez.

Although Mora used Petitioner's office as a meeting place for filling out paperwork, the investigators never met Mr. DeOcampo himself. Their contact was limited to persons who were

apparently law office staff, as well as Mora, who asserted that he was not an attorney but would be representing them on the claim. Mora also told the investigators that his daughter worked at the Law Offices of Alan DeOcampo.

Subsequently, Mora and Investigator Lasola, along with Investigator Greg Chinn (using the name Leo Wong) and Investigator Betty Rodriguez (using the name Betty Linn) filed a successful claim with 21st Century through Law Offices of Mazen Nabulsi. The chiropractic bills submitted to the insurance company included treatment that the investigators had not actually received from Dr. Rahim Batada.

In October of 2004, Mora and Investigator Lasola staged a collision, then reported that there were four victims. The four people who posed as the victims were represented in their claim to USAA by the Law Offices of Mazen Nabulsi and claimed to have received chiropractic treatment from Dr. Mehmandoust.

Mora and Investigator Linehan later collaborated to stage another accident. Three other people claimed to have been in the other vehicle. In their claim to Liberty Mutual, they were represented by the Law Offices of Susana Ragos Chung and claimed to have been treated by Dr. Mehmandoust. Mora informed Investigator Linehan that Scott Warren would pose as his passenger and make a claim. Warren provided a statement at the Law Offices of Alan DeOcampo, which represented him. The insurance company made a settlement offer as to

Warren, but petitioner ultimately returned the settlement proceeds to Liberty Mutual, explaining that he was withdrawing his representation of Warren. Another attorney, Albert Wood, later obtained the same settlement for Warren.

In March of 2005, an insurance claim was filed with Progressive Insurance by the Law Office of Susana Ragos Chung on behalf of three people who were in a staged collision orchestrated by Mora and Investigator Linehan. These people had been purportedly treated by Dr. Mehmandoust. This claim eventually settled.

B. Search Warrant

On September 20, 2006, Investigator Linehan applied for a search warrant. In his affidavit, he summarized the above insurance claims.

The warrant issued on September 20, 2006. It authorized the seizure of "all documents, business records, files, computers, and storage devices relating to the suspected criminal activity of insurance fraud."

The search warrant was executed on September 21, 2006, with a special master present. (See Cal. Pen. Code, § 1524.) During the search, the investigators seized various forms of digital information from computers (i.e., a mirror image of a hard drive, CD-ROM's, a laptop, software, and a floppy disk) as well as a box of documents.

C. Procedural History

On October 31, 2008, the trial court informed petitioner, through his counsel, that it was planning to release certain documents to the District Attorney. Petitioner was given an opportunity to review the documents and object to their disclosure.

On March 15, 2009, petitioner filed a motion to suppress. (Cal. Pen. Code, § 1538.5.) Petitioner argued, inter alia, that there was no probable cause to support the seizure of the documents, because they pertained to cases other than the undercover investigation cases. He argued that none of the documents should be released to the District Attorney.

On April 20, 2009, the trial court held a hearing on the motion to suppress. (Appendix A [reporter's transcript of hearing].) Petitioner argued there was no probable cause to establish that any other cases involved fraudulent activities and that the documents proposed to be disclosed went beyond the basis for the search warrant.

The trial court noted that it was only planning to release documents from cases in which one of the chiropractors had billed for treatment. (App. A.) The trial court explained that there was "probable cause that the chiropractors were involved in fraudulent activity," and that "each of [the chiropractors] has been convicted of a felony for the activity." (App. A.)

The trial court's order permitted the release of three categories of documents: (1) letters from petitioner's law office to various insurance companies; and (2) case payment logs; (3) documents involving administrative costs and pay-offs. (App. A.) The trial court stayed the disclosure of the documents to give petitioner an opportunity to seek review of its order. (App. A.)

Petitioner next filed a petition for writ of mandate and request for stay in the First District Court of Appeal, along with a request to file under seal the documents that were ordered disclosed. On July 8, 2009, the First District Court of Appeal filed an order granting the motion to file documents under seal, but denying both the petition for writ of mandate and the request for a stay. (App. B.)

On August 12, 2009, the California Supreme Court filed an order denying petitioner's timely petition for discretionary review.

REASONS FOR GRANTING THE PETITION

I. The Seizure Of All Of A Law Office's Client Files, Without Evidence That The Law Office Was Involved In Widespread Insurance Fraud, Violated The Fourth Amendment's Requirement That Warrants Be Issued Only Upon Probable Cause; Certiorari Should Be Granted Because California Courts Are Bound To Follow The United States Constitution Regarding The Issuance of Warrants for Search and Seizure.

"The government may not conduct widespread, suspicionless searches under the Fourth Amendment without evidence that it is engaged in something more than a far-flung fishing expedition ...." (*Loder v. City of Glendale*, 14 Cal.4th 846, 911 (1997).) In this case, the government obtained a search warrant that permitted it to go on an unconstitutional fishing expedition, seizing documents and digital files pertaining to all of the clients of petitioner's law office, despite the fact that there was no evidence of any widespread fraudulent activity originating from the law office.

A. General, Exploratory Warrants Are Prohibited By The Fourth Amendment

"General warrants ... are prohibited by the Fourth Amendment." *Andresen v. Maryland*, 427 U.S. 463, 480 (1976).) Thus, issuance of a warrant that authorizes a " 'general, exploratory rummaging in a person's belongings' " is unconstitutional. (*Andresen v. Maryland*, *supra*, at 480, quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 [91 S.Ct. 2022, 2038] (1971).)

Such "general exploratory searches ... unreasonably interfere with a person's right to privacy." (*Burrows v. Superior Court* , 13 Cal.3d 238, 249 (1974), citing *Marron v. United States,* 275 U.S. 192, 196 [48 S.Ct. 74] (1927).) "The need to prevent 'general, exploratory rummaging in a person's belongs' ... is particularly acute" when the warrant pertains to document searches, which "unlike searches for other tangibles, 'tend to involve broad

disclosures of the intimacies of private lives, thoughts and transactions.' " (*United States v. Washington,* 797 F.2d 1461, 1468 (9th Cir. 1986), internal citations omitted.)

"In order for a search to be reasonable, the warrant must be specific. Specificity has two aspects: particularity and breadth. "Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." (*In re Grand Jury Subpoenas Dated Dec. 10, 1987,* 926 F.2d 847, 856-857 (9th Cir. 1991).) "[T]he concept of breadth may be defined as the requirement that there be probable cause to seize the particular thing named in the warrant." (*Ibid.*)

An illustration of a warrant suffering from unconstitutional overbreadth appears in *Center Art Galleries-Hawaii, Inc. v. United States,* 875 F.2d 747 (9th Cir. 1989) [superseded by statute on other grounds as stated in *J.B. Manning Corp. v. United States,* 86 F.3d 926, 297 (9th Cir. 1996)], where search warrants were issued for a number of art galleries suspected of selling forged Salvador Dali artwork. The warrants permitted the investigators to seize all of the business records of the art galleries, not limited to documents related to the Dali artwork, "despite the total absence of any evidence of criminal activity unrelated to Dali." (*Id.*, at 750.)

Here, as explained more fully below, there was no evidence that any of petitioner's actual clients were involved in committing insurance fraud. However, the search warrant authorized an extensive, general search and seizure of petitioner's entire computer system for an unlimited number of documents. Thus, the search warrant was overbroad on its face.

B. There Was No Evidence That Petitioner's Law Practice Was Involved In Widespread Fraud.

Courts have rejected overbreadth attacks on search warrants where there was evidence that the business to be searched was " 'permeated with fraud.' " (*People v. Hepner*, 21 Cal.App.4th 761, 776 (1994); *see also United States v. Sawyer*, 799 F.2d 1494, 1508 (1986) ["in cases involving a pervasive scheme to defraud, all the business records of the enterprise may properly be seized"].)

The "permeated with fraud" concept applies where the affidavit in support of the search warrant contains "sufficient factual evidence of fraudulent activity from which a magistrate could infer that those activities are 'just the tip of the iceberg,' " such as where there is "evidence ... of a large number of fraudulent transactions or of documentation ... that the entire operation is a scam." (*United States v. Oloyede*, 982 F.2d 133, 140 (1992).)

A review of cases applying this principle demonstrates that the "permeated with fraud" justification is not applicable here, as there is evidence of only two fraudulent cases in petitioner's

practice, and no evidence that those two transactions – which were initiated by the undercover investigators, rather than regular clients – were representative of the cases in petitioner's practice such that a court could find that there was a "pervasive scheme to defraud." *(United States v. Sawyer, supra,* at 1508.)

In *United States v. Oloyede, supra,* a search warrant authorized an extensive search of an immigration attorney's practice. The affidavit in support of the search warrant detailed over 50 cases in which the attorney helped citizens apply for permanent residence using identical employer information, and the investigator found 26 files containing false documents, indicating that the business was "permeated with fraud." (*Id.*, at 139.)

By contrast, in *Center Art Galleries-Hawaii, Inc. v. United States, supra,* the court found that the "permeated with fraud" concept did not apply. There, the affidavit supporting the warrant contained twenty-two instances of alleged misrepresentation, all involving the artwork of Salvador Dali, and not evidence that any other artwork was fraudulent. Thus, "the broad scope of the warrants," which authorized a search that included documents and items unrelated to the Dali artwork, was not justified under the "permeated-with-fraud" doctrine. (*Id.*, at 751.)

In the instant case, the search warrant affidavit provided evidence of only two fraudulent insurance claims that came from petitioner's law office. Both

claims were instigated by the undercover investigators, who intended to commit fraud, and petitioner ceased his representation prior to settlement of one claim. There was no evidence that any actual clients of petitioner's law firm sought his representation in order to present fraudulent insurance claims. Moreover, the investigation revealed that Mora, who helped with the investigators' fraudulent claims, did not work for petitioner, but referred cases to various law firms.

The search warrant here broadly authorized a search of petitioner's entire client database, without restriction. Without any evidence suggesting that petitioner was engaged in widespread fraud, the warrant was clearly overbroad and thus unconstitutional.

C. There Was No Evidence That Petitioner's Actual Clients Were Involved in Fraud.

Although the undercover officers had specifically informed the chiropractors that they were uninjured, nothing in the undercover investigation established a "fair probability" that any of the law office's actual clients had received similar fraudulent treatment from the chiropractors. (*Illinois v. Gates*, 462 U.S. 213, 238 (1983).)

Here, the facts stated in the search warrant affidavit only established probable cause to believe that petitioner's law office had been involved in two fraudulent insurance claims – those involving the undercover investigators, one of which was actually

dropped by petitioner. The search warrant affidavit provided no probable cause to believe that petitioner's law office would contain evidence of any other fraudulent claims or capping activities. The search warrant affidavit provided evidence that some of petitioner's employees were connected with Mora, the alleged capper, but not that Mora himself was so connected with petitioner's law offices that evidence of his capping would likely be found there. It is clear that Mora worked closely with the chiropractor's offices, not the law firms, as he almost always met with the undercover investigators at the chiropractic offices. Moreover, the various cases involved representation by a number of different law firms, showing that petitioner's law offices were not the source of the fraudulent claims.

The overbroad warrant in the instant case is similar to the overbroad warrant in *Burrows v. Superior Court, supra.* In *Burrows*, an attorney was suspected of having misappropriated funds from a client. The search warrant authorized a broad search of the attorney's files, "not limited to documents relating to the person specified in the warrant." (*Id.*, at 241.) The court held the warrant overbroad, explaining, that the affidavit "did not relate any facts supporting the issuance of a warrant authorizing an unlimited search for and seizure of all of petitioner's records" and that it was "insufficient to justify a search of any of petitioner's records except those relating to the persons named in the affidavit." (*Id.*, at 250.)

Here, the search warrant affidavit described five instances of fraudulent insurance claims, all instigated by the undercover investigators, only two of which came from petitioner's law office, with petitioner dropping his representation in one of those two cases. In light of the fact that only one fraudulent claim ultimately came from petitioner's law office, there was simply no probable cause to believe that any of petitioner's other client files would reveal the existence of similar fraud.

D. The Trial Court's Limited Disclosure Order Did Not Cure The Error.

The government can not be permitted to conduct an overbroad seizure of documents, and then use the trial court as a filter for determining whether there were any documents that showed other clients using the same chiropractors. This simply goes against the principles of the Fourth Amendment. There must be probable cause to support the seizure of a "particular thing." (*In re Grand Jury Subpoenas Dated Dec. 10, 1987, supra,* at 857.) In the case at bar, the trial court attempted to cure the search warrant's obvious overbreadth problem by limiting the number of documents actually released. It would set dangerous precedent if the disclosure is permitted in this case.

As noted above, after its in camera review of the computer hard drive image, the trial court ordered only some of the documents released to the District Attorney. Specifically, the trial court decided to release only documents from cases in which one of the chiropractors was involved. (App. A.)

The trial court's limited disclosure order did not cure the overbreadth of the search warrant. The trial court's order still permits the District Attorney to access documents as to which there was no probable cause to believe that they constituted evidence of criminal activity. The documents ordered disclosed by the trial court merely show that a number of petitioner's clients settlements include bills for chiropractic treatment from the chiropractors who were involved in the undercover investigator's fraudulent insurance claims. There is no probable cause to believe that any of these actual clients were involved in fraud. The mere fact that their settlements include bills from the same chiropractors does not give rise to an inference that the chiropractors' bills were fraudulent.

E. To Permit Release of Documents Obtained Based On A Constitutionally Deficient Warrant Will Cause Irreparable Harm to Petitioner and His Clients.

The pending disclosure order still permits the release of documents without probable cause to believe that they will provide evidence of a crime. To uphold the search warrant and permit the release of documents in this case would effect irreparable harm to numerous innocent people, as it would permit the District Attorney to investigate all of petitioner's clients who received treatment from certain chiropractors, and put those clients under suspicion of insurance fraud based on pure speculation, not probable cause to believe that they committed insurance fraud.

The disclosure of the documents would permit the District Attorney to conduct a fishing expedition for further evidence. With no actual evidence of insurance fraud beyond the cases involving the undercover officers, the District Attorney could investigate all of petitioner's clients who saw one of the chiropractors as part of their treatment, and put those clients under suspicion of insurance fraud based on pure speculation, not probable cause.

Disclosure of the documents would abrogate the Fourth Amendment's requirement that a warrant be issued only upon probable cause and with particularity.

Accordingly, petitioner asks this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: November __, 2009 Respectfully submitted,

Syda Kosofsky
849-C Almar Ave. #194
Santa Cruz, CA 95060
(831) 425-7702
Counsel for the Petitioner